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ANN BAVENDER\*  
ANNE GOODWIN CRUMP  
VINCENT J. CURTIS, JR.  
RICHARD J. ESTEVEZ  
PAUL J. FELDMAN  
RICHARD HILDRETH  
FRANK R. JAZZO  
ANDREW S. KERSTING  
EUGENE M. LAWSON, JR.  
SUSAN A. MARSHALL\*  
HARRY C. MARTIN  
GEORGE PETRUTSAS  
RAYMOND J. QUIANZON  
LEONARD R. RAISH  
JAMES P. RILEY  
KATHLEEN VICTORY  
HOWARD M. WEISS  
ALISON J. SHAPIRO

\* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

www.fhh-telcomlaw.com

FRANK U. FLETCHER  
(1939-1985)  
ROBERT L. HEALD  
(1956-1983)  
PAUL D.P. SPEARMAN  
(1936-1962)  
FRANK ROBERSON  
(1936-1961)  
RUSSELL ROWELL  
(1948-1977)  
EDWARD F. KENEHAN  
(1960-1978)

CONSULTANT FOR INTERNATIONAL AND  
INTERGOVERNMENTAL AFFAIRS  
SHELDON J. KRYE  
U. S. AMBASSADOR (ret.)

OF COUNSEL  
EDWARD A. CAINE\*  
MITCHELL LAZARUS\*  
EDWARD S. O'NEILL\*  
JOHN JOSEPH SMITH

WRITER'S DIRECT

812-0474

kersting@fhh-telcomlaw.com

March 17, 2000

Magalie R. Salas, Esquire  
Secretary  
Federal Communications Commission  
Room TW-B204  
445 12th Street, S.W.  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

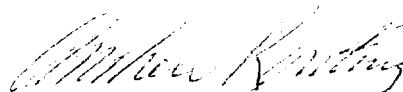
Re: *Ex Parte* Presentation - In the Matter of:  
Establishment of a Class A Television Service  
(MM Docket Nos. 00-10, 99-292; RM-9260)

Dear Ms. Salas:

In accordance with the Commission's *Ex Parte* rules, transmitted herewith are four copies of a memorandum which was provided to Commissioner Powell's office earlier today. The memorandum addresses matters which were discussed in meetings with the offices of the Chairman, Commission Furchtgott-Roth, Commissioner Ness, and Commissioner Tristani on March 15, 2000, by representatives of The WB Television Network, Pappas Telecasting Companies, and Davis Television Clarksburg, L.L.C. (and its affiliated entities).

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,  
FLETCHER, HEALD & HILDRETH, P.L.C.



Andrew S. Kersting  
Counsel for The WB Television Network and  
Pappas Telecasting Companies

Enclosure  
cc (w/ encl.): Mr. Keith Larson (FCC) (by hand)

ANN BAVENDER\*  
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U. S. AMBASSADOR (ret.)

OF COUNSEL  
EDWARD A. CAINE\*  
MITCHELL LAZARUS\*  
EDWARD S. O'NEILL\*  
JOHN JOSEPH SMITH

WRITER'S DIRECT

812-0474

kersting@fhh-telcomlaw.com

MEMORANDUM

TO: Marsha MacBride, Esquire

CC: Office of the Secretary  
Mr. Keith Larson (Mass Media Bureau)

FROM: Andrew S. Kersting *Andrew S. Kersting*

DATE: March 17, 2000

RE: In the Matter of: Establishment of a Class A Television Service  
(MM Docket Nos. 00-10, 99-292; RM-9260)

On March 15, 2000, representatives of The WB Television Network, Pappas Telecasting Companies, and Davis Television Clarksburg, L.L.C. (and its affiliated entities) met separately with Commissioner Furchtgott-Roth and Helgi Walker, Thomas Power, David Goodfriend, and Richard Chessen to address matters concerning the Commission's Class A LPTV rulemaking proceeding. The material set forth below was provided to each of the Commissioners' offices in advance of the scheduled meetings. If you have any questions concerning the material contained in this memorandum, please feel free to contact me at your convenience. As indicated above, a copy of this memorandum will be provided to the Office of the Secretary in accordance with the Commission's *Ex Parte* rules.

**Proposal to Require Class A LPTV Applications to Protect Pending Applications  
and Allotment Rulemaking Petitions for New NTSC Stations**

- I. Introduction.
  - A. Issue: Whether the Community Broadcasters Protection Act of 1999 (the “CBPA”) requires pending applications and allotment rulemaking petitions proposing new full-service television stations to protect subsequently-filed Class A LPTV applications.
  - B. Relevant Statutory Provision: Section 336(f)(7)(A) of the Communications Act (as amended by the CBPA) provides that the FCC may not grant a Class A license unless the applicant demonstrates, *inter alia*, that the proposed Class A station will not cause interference to the predicted Grade B contour “of any television station transmitting in analog format . . . .”
  - C. NPRM’s Proposal: Interpret §336(f)(7)(A) to require Class A applications to protect only *authorized* NTSC stations, *i.e.*, those full-power TV stations holding either a license or a construction permit.
  - D. Parties’ Proposed Interpretation: Class A applications also should be required to protect all pending applications and allotment rulemaking petitions proposing new full-power stations.
- II. Protecting Pending NTSC Proposals Would Be Consistent With the FCC’s Statements in the DTV Proceeding and Would Otherwise Serve the Public Interest.
  - A. Background. The applications and allotment rulemaking petitions currently pending before the FCC could result in approximately 250 new NTSC stations, many of which would be in underserved markets (*i.e.*, fewer than five commercial stations). The FCC has repeatedly stated that it would attempt to accommodate these pending applications and allotment rulemaking petitions for new NTSC stations, including those involving channels 60-69 and “freeze” waiver applications. In enacting the CBPA, Congress recognized that LPTV stations “serve a much smaller geographic region than do full-service stations,” and, thus, do not constitute a satisfactory substitute for full-power stations.
  - B. July 1987 Television Filing “Freeze”: Affording Class A applications protection from pending applications and rulemaking petitions for new NTSC stations would be inequitable due to the disparate treatment they received during the DTV filing freeze.

- C. The NPRM's Proposed Interpretation of Section 336(f)(7)(A) Would Be Inconsistent With Section 307(b) of the Act.

III. Legal Authority.

- A. The NPRM's Proposed Interpretation of Section 336(f)(7)(A) is Inconsistent With the Principles of Statutory Construction.

- 1. The phrase "transmitting in analog format" is ambiguous, and may be best read as a short-hand phrase for describing the entire NTSC universe. In the absence of a clearly expressed Congressional intent to overturn the FCC's existing and longstanding regulatory scheme through "clear, unmistakable and unarguable language," the existing scheme providing protection to primary service applications must stand.

- B. The NPRM's Proposed Interpretation is Inconsistent with Section 336(f)(7)(B) of the CBPA.

- 1. Section 336(f)(7)(B) requires Class A applications to protect authorized LPTV and TV translator applications, as well as pending applications for such facilities. The CBPA needed to specifically protect such secondary service applications because they otherwise have none.
  - 2. It would be inconsistent with the FCC's longstanding regulatory scheme to protect pending applications for LPTV and TV translators stations -- including those which are not eligible for a Class A license and will continue to be secondary services -- and fail to protect pending applications and rulemaking petitions for new NTSC stations, which have always been a primary service.

- C. The NPRM's Proposed Interpretation Could Result in a Violation of the Due Process Clause of the Fifth Amendment.

- D. The NPRM's Proposed Interpretation is Not Likely to Withstand First Amendment Analysis.

- E. The CBPA contemplated a small number of Class A stations. Therefore, the Class A criteria should be strictly construed.

IV. The Initial Comments of the Community Broadcasters Association ("CBA") Recognized that the FCC Must Protect Certain Pending NTSC Applications.

- A. An overwhelming number of comments supported the protection of pending NTSC proposals. In its initial rulemaking comments, even the CBA recognized that the FCC must protect certain pending applications for NTSC stations, including “post-auction applications, applications proposed for grant in pending settlements, and any singleton applications that are cut off from further filings.” *See* CBA Comments, p. 9.
- B. In its reply comments, the CBA attempted to reverse course and argued that Class A applications should be required to protect only authorized full-power stations (consistent with the NPRM’s proposal).

SCHEDULED ATTENDEES

Cathy Nolan, Vice President - Law & Public Policy, Time Warner.

Howard Shrier, Executive Vice President & Chief Operating Officer, Pappas Telecasting Companies.

Dennis P. Corbett, Esquire, on behalf of Davis Television Clarksburg, L.L.C. and its affiliated entities.

Vincent J. Curtis, Esquire and Andrew S. Kersting, Esquire on behalf of The WB Television Network and Pappas Telecasting Companies.

(John D. Maatta, Senior Vice President/General Counsel, The WB Television Network, who previously was scheduled to attend the meeting, will be unable to come to Washington as scheduled.)